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## CIRCUIT COURT OF FREDERICK COUNTY.

HON. T. W. HARRISON, Judge.

SARAH E. SMOKE v. RACHEL A. SMOKE.\*

In Vacation, November, 1905.

1. TRUSTS —*Establishment of in lands by parol*—*Case at bar*.—Where fraud would be perpetrated, a court of equity will interfere to declare the trust. Where land is purchased by one for the benefit of another and the deed is made to a third person without any declaration of trust, the trust may be set up by parol; and such third person, or those claiming under him, will not be permitted to violate the confidence reposed in him and defeat the trust.
2. TRUSTS —*Motive for gift*.—The motive must be clearly distinguished from a trust. A parol gift of lands to a woman for the maintenance and support of her husband and his family gives no title to the husband and family, but merely expresses the motive for the gift; and when the trust in such lands is established it will be set up in favor of the wife alone.
3. CHANCERY PLEADING AND PRACTICE —*Variance between allegations and proof*.—A bill seeking to establish the ownership of land in complainant alleged that the complainant furnished the money for its purchase, whereas the evidence showed another person furnished the purchase money: *Held*, the essence of the claim was that the property was purchased for the complainant and the exact source from which the consideration came is immaterial, especially in the absence of all exception to the proof on the ground of variance.
4. LACHES —*Failure to assert a right*.—There is no occasion to assert a right by suit until that right is denied by some one and the enjoyment of it threatened; and no charge of laches lies against a plaintiff for not suing until her rights are denied.

Suit in equity by plaintiff to establish in herself title to lands claimed by defendant as devisee of David L. Smoke, the holder of the recorded legal title. The plaintiff was declared to be the owner and special commissioner appointed to convey the land to her by deed.

Opinion by HON. T. W. HARRISON, Judge:

*Facts.*

On April 6, 1877, "S" deeds in fee the farm in controversy to David L. Smoke, and Sarah E. Smoke and family enter into immediate occupancy of the same. Sarah E. Smoke was the wife

\*Reported by Carroll G. Walter.

of John W. Smoke, who was the brother of E. B. Smoke. and of David L. Smoke, and the son of Lucy Smoke. At the date of this purchase David and E. B. Smoke lived with their mother in White Hall, and David, an unmarried young man, conducted a small store in partnership with John M. Silver. John W. at this date was and ever since has been insolvent. Any conveyance to him meant a distribution to his creditors of the amount of the conveyance. At this date the first crude attempt at legislation for married women to enable them to hold property in separate right was two days old. Up to that time in fact as well as in law women were *sui non juris* and the trust estate as always the essential feature of property intended for their benefit. I am perfectly satisfied from my own experience at the bar during succeeding years that no conveyancer would have ever deeded property directly to a married woman which was designed to be the home for the family. A trustee was regarded as the proper holder of the legal title in all such arrangements. In 1878 Mrs. Lucy Smoke made her will in which she devised all her property to be equally divided between David and E. B. Smoke, ignoring the claims of John's struggling and improverished family, about whose welfare the evidence shows she was always solicitous. 1885 she dies, judging from the probaton of her will, and David sells out all his interests in White Hall, makes an absolute conveyance of this property to Sarah as the best method of securing the benefit of it to John and his family, and removes to Tennessee. The deed to this property was left, evidently acknowledged, from Dr. Smoke's letter, with Dr. Smoke and remained in his possession until February, 1892, a period of six years, when, at David's request, the same was returned to him. The apology contained in Dr. Smoke's letter would indicate that David had taken him to task for failure to record the deed, and the inference to be drawn would seem to be that he had recalled the deed for the purpose of assuring himself that the deed had gone to record; however this may be, the significance of this absolute deed is in no sense weakened as an admission hourly and daily and yearly made by the ostensible owner that he held but the legal title with the beneficial ownership in the occupant. There are in evidence declarations of David that he had furnished none of the purchase money and had no interest in the land. The testimony of Dr. Smoke, who lived with David

and his mother, is to the effect that his mother furnished the bulk of the money. I regard this statement that it was his belief his mother furnished the money but a careful and guarded statement of a fact upon his part to the best of his recollection. David lived until August, 1901, nearly a quarter of a century after the execution of this deed, and never during this period do I find in this record a single suggestion that he was entitled to the beneficial ownership or a single act looking to the disturbance of Sarah E. Smoke and family in the full enjoyment of its beneficial ownership. The first demand of this character proceeds from the beneficiary under the broad but vague terms of his will. I think the commissioner forcibly sums up the evidence, and warrants his conclusions of fact: First, Lucy Smoke bought the property; second, that for obvious reasons detailed in the record the title was put in the name of a trustee, David L. Smoke; third, the trusts were declared in the deed that for six years lay in the hands of E. B. Smoke, which, at the date of the deed, secured the purposes for which the property was originally bought, but which at the date of the purchase would not have been considered sufficient owing to the very recent change in the statute law. The payment of taxes imparts little where the title is outstanding in the trustee, and under the circumstances of this case.

*The Law.*

It has in several cases in Virginia been queried whether a parol trust can be established in Virginia in land. *Sprinkle v. Haworht*, 26 Gratt., *Borst v. Nalle*, 28 Gratt., *Jesser v. Armentrout*, 100 Va.

In West Virginia it is well settled that such a trust can be established and in a learned opinion by Judge Green in a case in 15 W. Va. he places the law in that state upon reason and authority.

I take it, however, that wherever a fraud would be perpetrated there can be no question but that a court of equity would interfere and declare the trust. The evidence warrants the finding of the commissioner that the mother bought this property and the title was taken in the name of the brother to best accomplish the purposes had in view. He must have been a party to this arrangement. It is irresistibly to be deduced from this finding of fact that David agreed with his mother that he would hold this property

subject to the trusts for which she bought it. It would be a fraud to permit David or any volunteer under him to take advantage of this confidence reposed in him, defeat the trust, which enabled him to secure the title, and hold property as his own which he obtained on his promise to hold for another. I believe that even under the English statute of frauds such a trust would be enforced as in the nature of a constructive trust, where a fiduciary purchases property in his own name with the funds of his *cestui qui trust*.

Some point seems to be made in the argument that at least the trust was not in favor of Sarah E. Smoke but of John W. Smoke and his family. I do not regard the point well taken. The motive for the gift to Sarah was evidently the resulting benefit to John, who could own no property, and his family, but the motive must be clearly distinguished from a trust. Often in a will or deed a testator gives property to his widow for the support and maintenance of herself and children, and the reports are full of cases which hold the children have no title to the property but such words are to be interpreted as declarations of the motive which induced the gift. Suppose the deed had been to Sarah E. Smoke in express terms for the maintenance and support of herself and family, or as a home for the family, under repeated decisions such terms would have been held as mere expressions of the motive which induced the mother of John to donate the property to her and not as creating any rights in John, the very thing she was for obvious reasons seeking to avoid.

Judge Allen in the case of *Clarke v. McClure*, does use some expressions as that a parol gift of land was unknown to the law of Virginia, but he was addressing himself to the action of ejectment. Parol gifts of land have been so numerous sustained in Virginia that by the Code of 1887, section 2413, the law was changed by statute. The law ignored such titles but equity freely enforced them. The law must be applied as it existed at the date of this transaction and not after rights had vested.

I do not regard the variance between the pleadings and the evidence as material. The bill claims that Sarah furnished the money to purchase the property, the evidence establishes that Mrs. Lucy Smoke furnished the money for the purchase of the property for the benefit of Sarah. The essence of the claim is that the property

was bought for Sarah and the exact source from which the consideration came is immaterial, especially in the absence of all exception to the proof on the ground of variance.

In view of my conception of the testimony I have come to the conclusion that the commissioner's report should be sustained, and adopting the views of the commissioner as expressed in his report as my own, without unnecessary repetition, I overrule the exceptions, and a decree can be entered accordingly.

I neglected to notice one point, namely, the delay on the part of the plaintiffs in bringing this suit; but do not consider this point well taken, for there was no occasion on the part of the plaintiff to bring this suit until some attempt was made to disturb the arrangement which, according to the findings of the court, was made by the parties and there was some attempt on the part of the trustee to claim the beneficial ownership. If laches there were, it would be on the part of those claiming under the trustee in (not) claiming beneficial ownership until after the death of the trustee and until the death of all parties directly interested or until the other had become incompetent witnesses by reason of the death of the adverse parties. It is the defendant in this case who is seeking to disturb the status of many years, and no charge of laches lies against the plaintiff to merely insist upon a continuance of the status.